

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNY T. BOLTON,	§
	§ No. 528, 2008
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0308019557
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 30, 2008

Decided: February 18, 2009

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 18<sup>th</sup> day of February 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Johny T. Bolton, filed an appeal from the Superior Court's September 29, 2008 order denying his motion for sentence modification pursuant to Superior Court Criminal Rule 35. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.<sup>1</sup> We agree and affirm.

(2) In October 2003, Bolton was indicted on charges of Unlawful Sexual Contact in the Second Degree and Sexual Solicitation of a Child. In February 2004, Bolton pleaded guilty to both charges. On that date, the Superior Court granted the State's motion to declare Bolton a habitual offender with respect to the sexual solicitation conviction.<sup>2</sup> Bolton was sentenced to 10 years at Level V on that conviction and to 2 years at Level V, to be suspended for 2 years at Level III probation, on the sexual contact conviction.

(3) In this appeal, Bolton claims that the Superior Court abused its discretion when it denied his motion for sentence modification because the prison's failure to treat him for Hepatitis C constitutes an "extraordinary circumstance" under Rule 35.

(4) Under Rule 35(a), the Superior Court "may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided . . . for the reduction of sentence." Rule 35(b) provides a 90-day time limit in which to apply for a reduction of sentence. An application made outside the 90-day time limit will be

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<sup>1</sup> Supr. Ct. R. 25(a).

<sup>2</sup> Del. Code Ann. tit. 11, § 4214(a).

considered only “in extraordinary circumstances” or pursuant to Del. Code Ann. tit. 11, § 4217.<sup>3</sup>

(5) Sexual Solicitation of a Child is a Class C violent felony punishable by up to 15 years at Level V.<sup>4</sup> As such, Bolton’s 10-year sentence on that conviction falls within the statutory maximum and is, therefore, not illegal under Rule 35(a).<sup>5</sup> Moreover, because Bolton’s sentence is a mandatory sentence under § 4214(a),<sup>6</sup> the Superior Court had authority under Rule 35(b) to consider reducing his sentence on the basis of his medical condition only if the Department of Correction had applied for a modification of sentence in accordance with § 4217.<sup>7</sup> Because the Department of Correction made no such application, Bolton had no right to a sentence reduction under Rule 35(b).

(6) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by

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<sup>3</sup> Under § 4217(b), the Superior Court may reduce a defendant’s sentence on the basis of an application by the Department of Correction for “good cause” shown which certifies that release of the prisoner will not constitute a substantial risk to the community or to the prisoner himself. “Good cause” includes “serious medical illness or infirmity of the offender.”

<sup>4</sup> Del. Code Ann. tit. 11, §§ 1112A(c), 4201(c) and 4205(b) (3).

<sup>5</sup> *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).

<sup>6</sup> In fact, it appears that, under that statute, Bolton should properly have been sentenced to 15 years, rather than 10 years, at Level V.

<sup>7</sup> Del. Code Ann. tit. 11, §§ 4217(b)-(f); *Sturgis v. State*, 947 A.2d 1087, 1091-93 (Del. 2008).

settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice